No. 5478

United States Circuit Court of Appeals

For the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,

Appellant,

vs.

BERTHA E. LIPP,

Appellee.

Respondent's Answer and Reply to Appellant's Petition and Brief

Upon Appeal From the United States District Court for the District of Oregon

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STATEMENT

(Note: Italics in quotations from authorities contained in this brief, unless otherwise indicated, are ours).

In appellant's petition at page 4, it is stated:

> "The only substantial question at issue between the parties to the litigation is whether or not the insured John A. Lipp is dead."

The record in this case does not justify that statement.

There were many other questions of fact in the case that were vital, failure to prove which, on the part of respondent, would have been fatal to her case, viz: The answer of appellant to respondent's complaint beginning at page 38 of the printed transcript of record, paragraph I, denies paragraph I of the complaint, that is, that respondent was a citizen and resident of Oregon. Paragraph IV of the answer denies that respondent was the relict of John A. Lipp. Paragraph V denies that the policy described in paragraph V of the complaint and which was the policy sued on, was issued by appellant. Paragraph VI denies paragraph VI of the complaint, that is, that Lipp paid all of the premiums on the policy. Paragraph VII denies that Lipp died as stated in paragraph VII of the complaint. Paragraph VIII denies each and every allegation contained in paragraph VIII of the complaint *that is making proofs of death.* The same is true of paragraphs IX, X and XI of the answer. All of these issues on the part of the plaintiff below had to be maintained and established by her,—otherwise she would have failed. Furthermore it appears in the Bill of Exceptions and also from paragraph VII of the complaint that the judgment of the Circuit Court of Coos County between these parties, wherein it was found that John A. Lipp died on January 31, 1924, *was not pleaded in the complaint* in this case as an estoppel, but was offered simply *as evidence of a fact in issue* between the parties (p. 53 printed transcript of record). The introduction of that judgment as evidence on the part of respondent was objected to upon the *ground that it had not been pleaded as an estoppel.* (p. 53 Tr.).

Upon the trial in the State Court appellant objected to the intoduction of testimony as to family and community repu-

tation of the death of John A. Lipp. That appears from the judgment of the Supreme Court reversing the case (p. 15 appellant's petition and brief). Upon the trial *in this Court appellant offered testimony of community reputation* and excepted to the Court's order refusing it, (See p. 57 Tr. testimony of E. M. Dietrich) where appellant offered to prove that that witness "knows the community reputation in the City of Vancouver as to whether John A. Lipp is dead or alive and that said community reputation is that John A. Lipp is alive." It made a similar offer by the testimony of William Thompson, (p. 58 Tr.) and made a similar offer by the testimony of Lewis Kadow (p. 59 Tr.) and excepted to the action of the Court in refusing it. At pages 46 and 47 of the transcript the refusal of the Court to admit the testimony of those witnesses is assigned as error in this case.

ARGUMENT

I.

Appellant founds and bases its right to the relief asked in its petition upon the authority of Butler vs. Eaton 141 U. S. 240, quoted extensively in its brief at pages 6 to 8 inclusive, while we deny that a correct understanding of that case warrants the relief sought in this case or justifies the interpretation put upon the case by appellant's counsel. If that case bears the interpretation put upon it by appellant's counsel, it is evident that the Supreme Court has reversed it in a later case, viz: Deposit Bank vs. Frankfort, 191 U. S. 510 as follows:

> "It is urged that the state judgment upon which the Federal decree of 1898 is based was afterward

reversed by the highest court of Kentucky, and, therefore, the foundation of the decree has been removed and the decree itself must fall. But is this argument sound? When a plea of res judicata is interposed based upon a former judgment between the parties, the question is not *what were the reasons upon which the judgment proceeded, but what was the judgment itself,* was it within the jurisdiction of the court, between the same parties, and is it still in force and effect. The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based *if the court might inquire into and revise the reasons which led the court to make the judgment.* In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were in the judgment of the court before which the estoppel is pleaded insufficient, a new judgment could be rendered because of these divergent views and the whole matter could be at large. In other words nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons *or has been subsequently reversed,* that it is any the less effective as an estoppel between the parties while in force. In Crescent City Live Stock Co. v Butchers' Union Slaughter House Co., 120 U. S. 141, the question of what effect should be given to a decision of a court of the United States as proof of probable cause in a suit for a prosecution which was

alleged to be malicious was before the court. *It appeared that the judgment relied upon had been subsequently reversed, and it was held that this made no difference unless it was shown that the judgment was obtained by means of fraud.* Mr. Justice Matthews, delivering the opinion of the court, said:

> " 'Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defence, either by plea or in proof, as it would be in any other circumstances. While it remains in force, it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate, and even after reversal it still remains, as in the case of every other judgment or decree in like circumstances, sufficient evidence in favor of the plaintiff who instituted the suit or action in which it is rendered, when sued for a malicious prosecution, that he had probable cause for his proceedings.'

"The precise question was before the Court of Appeals of New Cork in Parkhurst v. Berdell, 110 N. C. 386, in which case a judgment was relied upon as an estoppel in a suit between the same parties. The first suit settled certain matters in controversy in the second suit, and was given force and effect as an estoppel, *but was afterward reversed by the appellate court.* The second suit, in which it was relief upon, came before the Court of Appeals, and it was claimed that the reversal of the judgment in the first suit would avoid its force as an estoppel between the parties. The court said (p. 392):

> "'If the *judgment roll was competent evidence* when received, its reception was not rendered erroneous by the subsequent reversal of the judgment. Notwithstanding its reversal, it continued in this action to have the same effect to which it was entitled when received in evidence. *The only relief a party against whom a judgment which has been subsequently reversed has thus been received in evidence can have, is to move on that fact in the court of original jurisdiction for a new trial and then the court can, in the exercise of its discretion, grant or refuse a new trial, as justice may require.'*

> "It is to be remembered that we are not dealing with the right of the parties to get relief from the original judgment by bill of review or other process in the Federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application. *In every other forum the reasons for passing the decree are wholly immaterial* and the subsequent reversal of judgment upon which it is predicated can have no other effect that to authorize the party aggrieved to move in some proper proceeding, *in the court of its rendition, to modify it or set it aside.* It cannot be attacked collaterally, and in every other court must be given full force and effect, irrespective of the reasons upon which it is based. Cooley on Cons. Limitations, 7th ed. 83 et seq., and cases cited."

The interpretation put upon Butler vs. Eaton by appellant's counsel is radically at variance with Deposit Bank vs. Frankfort, but the latter case can be harmonized with the former case, it seems to us, by the adoption of the following interpretation of Butler vs. Eaton:

The facts in Butler vs. Eaton briefly are: A case com-

menced in the State Court of Massachusetts went to judgment for the defendant. Being between the same parties, *it was pleaded in bar as an estoppel* in the case of Butler vs. Eaton and a judgment entered in that case for the defendant *based solely upon such estoppel.* The case in the State Court involving a Federal question found its way to the Supreme Court and at the same session of the Court came the case of Butler vs. Eaton. In the former case from the State Court the Supreme Court not only reversed the judgment, but held that it should never have been entered for the defendant, but that a judgment should have been entered for the plaintiff, and thereupon proceeded *to enter a final judgment for the plaintiff.* Then proceeding with the case of Butler vs. Eaton, an examination of the record found that its sole support was the judgment which they had reversed and which they state at page ....

> "It is apparent from an inspection of the record that the *whole foundation* of that part of the judgment which is in favor of the defendant is *to our judicial knowledge* without any validity force or effect *and ought never to have existed.*"

and they thereupon proceeded to reverse the judgment in Butler vs. Eaton and entered therein a final judgment for the plaintiff.

There is a very wide distinction between Butler vs. Eaton and the case at bar: First: As shown in Butler vs. Eaton the judgment of the State Court *was pleaded as an estoppel.* Paragraph VII of the complaint in this case alleges the death of Lipp and to *prove that fact we simply offered in evidence* a certified copy of the judgment entered between the same parties in the Circuit Court of Coos County. That stands upon

the same plane as any other *documentary evidence* offered to prove a fact in issue. Its verity, truth or falsity is, like any other evidence, to be determined at the time of its admission in evidence. If this Court may on this appeal investigate or question the verity of that piece of documentary evidence offered at the trial in support of a disputed question of fact, then it may by the same line of reasoning question the verity of any other testimony, oral or documentary evidence, given upon the trial. Suppose that it were now authentically shown by the certificate of the County Clerk of Coos County, custodian of the records, that the certified copy of the judgment offered on the trial of this cause in the District Court was fabricated or forged and that no such judgment had ever been entered, could this Court, upon this appeal, considering the state of the record, reverse the judgment for that reason? It is settled beyond question that the truth or falsity of testimony offered on trial of a cause, or the verity of documentary evidence, is to be determined upon the trial, and the fact that after judgment certain tesimony given on the trial is found to be false or perjured, or that documentary evidence offered was forged, is not sufficient to overturn the judgment either upon appeal or by direct suit for that purpose. Suppose that in this case instead of offering a certified copy of the judgment of the Coos County Court to prove the death of Lipp, we had proved it by the testimony of a witness named John Doe, and he had testified that he knew Lipp in his lifetime, that Lipp died in California on the date mentioned in the complaint, that he was present at his funeral and identified his corpse, and thereafter that John Doe had been indicted, tried and found guilty of perjury in giving that testimony, and a certified copy of that conviction brought here and presented to the Court for the purpose of obtaining a reversal, could the Court act on it?

It could not for the simple reason that the truth or falsity of that tesimony was determined at the trial. There is an unbroken line of authority, concurred in by the Supreme Court of the State of Oregon, that a judgment given on testimony that was perjured will not be set aside for that reason, except perhaps on motion for new trial in the Court entering the judgment.

Second: The other distinguishing feature between Butler vs. Eaton and the case at bar is that the judgment of the Supreme Court of Oregon reversing the Circuit Court of Coos County simply ordered that a new trial be had, while in Butler vs. Eaton there was a final judgment entered for the opposite party, thereby not only destroying the foundation upon which the entire judgment depended, but making it utterly impossible to ever restore or give any validity to the judgment which had been pleaded as an estoppel.

The case of Hennessey vs. Tacoma Smelting & Refining Co., 129 Federal and the case of Ransom vs. City of Pierre, 101 Federal, cited by appellant in its brief, pages 9-12, were rendered before the case of Deposit Bank vs. Frankfort supra, and as neither of those cases have the distinguishing features that the case at bar is shown to have, and they both following Butler vs. Eaton, must yield to Butler vs. Eaton as qualified by Deposit Bank v. Frankfort. Those cases control this Court regardless of any former decision of this Court.

That the practice of using the judgment obtained in the Circuit Court of Coos County merely as evidence of a fact instead of pleading it, is the approved practice in the courts of Oregon and elsewhere, is shown by the following from the case of Farmers & Fruit-Growers Bank vs. Davis 93 Ore. p. 664, pts. 4 and 5:

"The rule that an estoppel by judgment to be available must be pleaded does not apply whereas in the case at bar the judgment instead of being relied upon in bar of the action, is attempted to be introduced in evidence merely as conclusive of some particular fact formerly adjudicated. In such case, it need not be pleaded in order to make it conclusive. The rule is stated in Swank vs. St. Paul City Ry. Co. 61 Minn. 423 (63 N. W. 1088) as follows:

" 'A former judgment on the same cause of action, being a complete bar to a second action, must always be pleaded by way of defense: Bowe v. Minnesota Milk Co. 44 Minn. 460 (47 N. W. 151). But a former judgment is no bar to a second suit upon a different cause of action. It merely operates as conclusive evidence of the facts actually litigated in the first action, and upon the determination of which the finding or verdict therein was rendered, and need not be pleaded any more than any other evidence. In such a case it is proper for a party to plead his cause of action or defense in the ordinary form, leaving the judgment to be used in evidence to establish his general right.' "

In Krekeler v. Ritter 62 N. Y. 372, 374, the Court uses the following language:

"The record of the Superior Court was not offered or received in evidence in bar of the action, but merely *as evidence of the fact in issue*. Had it been offered as constituting a bar, or as an estoppel to the action, it would have been inadmissible, not having been pleaded as a defense. (Citations). But as evidence of a fact in issue it was competent although not pleaded like any other evidence, whether documentary or oral. A party is never required to disclose his evidence by his pleadings. The evidence was competent to disprove a material allegation of

> the complaint traversed by the answer. As evidence it was conclusive as an adjudication of the same fact, in an action between the same parties."
>
> "5. The complaint alleges that the plaintiff is the owner of the property in question and entitled to the possession thereof. We think it is sufficient without amendment. *It was not required to plead its evidence.*"

See also to the same effect 34 C. J. p. 1066, Sec. 1507.

An examination of appellant's brief at pages 24 to 26 inclusive shows that the only assignment of error that is argued and pressed here consists in the fact that we offered the judgment obtained in Coos County as evidence without pleading it, citing authorities in support of it.

The foregoing case, Farmers & Fruit-Growers Bank v. Davis and 34 C. J. p. 1066, Sec. 1507, are decisive of the questions assigned as error and argued by appellant at p. 24 et seq of its brief, i. e., errors (1), (2), (3).

II.

CHARACTER OF ORDER IN CASE OF REVERSAL

If the Court should conclude to reverse this case it will do so of course upon the grounds stated in the different decisions cited by appellant,—that is to say, for the sake of expediency and to prevent the expense and necessity of independent proceedings at law or equity; in other words, in the interest of justice. It will be evident to the Court that upon a re-trial in the Circuit Court of Coos Couny, if the judgment is for the plaintiff (respondent), it will be decisive of this case. If it is for the defendant (appellant) it will be equally decisive of this

case. To reverse this case means to re-try both cases again at a big expense to both parties. We suggest that if the Court concludes to reverse, that in the interests of justice the order here should be that all proceedings in this case be stayed and held in abeyance until the trial of the case in the Circuit Court of Coos County, and if, upon that trial, the judgment be for the plaintiff (respondent) that the judgment here be affirmed, and if the judgment there be for the defendant (appellant) that it be reversed.

In case of reversal here the question will arise as to costs. It cannot be reversed because of any error committed by respondent. There was no error in the court below. Causes intervening since the trial alone justifies the Court in reversing, and therefore we very earnestly insist that the costs of this appeal in the event of a reversal should be borne by appellant, and at the very outside that neither party should recover costs.

In Volume 297 Federal at page 585 (we have not the name of the case at hand as we write this brief) was a case by the C. C. A. decisive of what is here contended for. The Court there set aside the judgment of the trial court for the same reason that this Court will set aside this judgment, if it does so, and in doing so the Court taxed the costs to the appellant.

Respectfully submitted,

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